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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91200153
Party	Defendant Mango's Tropical Cafe, Inc.
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Date	11/04/2011
Attachments	Applicant's Motion for Summary Judgment & Memo of Law in Supp.pdf (25 pages)(696073 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Universal International Music B.V.,
Opposer,

v.

Mango's Tropical Cafe, Inc.,
Applicant.

Opposition No.: 91200153

Application Serial No.: 85/069,828

Date of Publication: December 7, 2010

Mark: MANGO'S TROPICAL CAFE AND DESIGN

/

APPLICANT'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Pursuant to Rule 2.127, Trademark Rules of Practice, and Rule 56, Fed.R.Civ.P., Applicant Mango's Tropical Cafe, Inc., (hereinafter "Applicant"), hereby moves for summary judgment that no likelihood of confusion exists between Applicant's mark, **MANGO'S TROPICAL CAFE and Design** (hereinafter referred to as "Applicant's Mark"), on the one hand, and Opposer's marks, **MANGO** and **MANGO and Design** (hereinafter referred to as "Opposer's Marks"), on the other.[1] Because Applicant's Mark and Opposer's Marks are dissimilar in their entireties as to appearance, sound, connotation and commercial impression, there is no likelihood of confusion and Applicant's Motion for Summary Judgment should be **GRANTED.**

[1] Through the filing of this Motion, Applicant is not waiving and, in fact, expressly reserves its right to move for summary judgment, if necessary, on the first essential element of Opposer's claim (i.e., that Opposer does not have prior rights as a result of Opposer's abandonment). While Applicant believes that it is entitled to summary judgment on this aforementioned ground, it is, at this time, moving on only the issue of likelihood of confusion between the marks at issue in this proceeding in an effort to avoid potentially unnecessary expense regarding the other issues.

I. THE LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment under Rule 56, Fed.R.Civ.P., is appropriate if the evidence in the case indicates that "there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party bears the burden of demonstrating the absence of all genuine issues of material fact. However, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no issue of *material* fact." *Anderson*, 477 U.S. at 248 (emphasis added). An issue is material when its resolution would affect the outcome of the proceeding under governing law. *Id.* "The burden on the moving party may be discharged by 'showing' - that is, pointing out to the district court - that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

The United States Patent and Trademark Office Trademark Trial and Appeal Board ("TTAB") has stated that

> [t]he purpose of summary judgment is one of judicial economy, that is, to save the time and expense of a useless trial where no genuine issue of material fact remains and *more evidence than is already available in connection with the summary judgment motion could not reasonably be expected to change the result.*

The John W. Carson Foundation v. Toilets.com, Inc., 94 U.S.P.Q. 2d 1942, 1953 (TTAB 2010), *citing Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 222 U.Q.P.Q. 741, 743 (Fed. Circ. 1984) (emphasis added).

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II. THE ISSUE OF A LIKELIHOOD OF CONFUSION IS PROPERLY DECIDED ON A MOTION FOR SUMMARY JUDGMENT.

The non-existence of a likelihood of confusion may properly be decided on a motion for summary judgment. *Kellogg Company v. Pack'Em Enterprises, Inc.*, 951 F.2d 330 (Fed.Cir. 1991) (affirming grant of Applicant's summary judgment motion on issue of likelihood of confusion); *see also Anheuser-Busch, Inc. v. Coyote Springs Brewing Company*, 2000 TTAB LEXIS 311, *4-9 (TTAB May 12, 2000) (granting Applicant's summary judgment motion on issue of likelihood of confusion); *Cheeseborough-Pond's Inc. v. Faberge, Inc.*, 666 F.2d 393 (9th Cir. 1982) *cert. denied*, 459 U.S. 967 (1982); *Pignons, S.A. de Mecanique de Precision v. Polaroid Corp.*, 657 F.2d 482 (1st Cir. 1981); *Harvey Cartoons v. Columbia Pictures Industries, Inc.*, 645 F. Supp. 1564 (S.D.N.Y. 1986); *Programmed Tax Systems, Inc. v. Raytheon Co.*, 439 F. Supp. 1128 (S.D.N.Y. 1977).

III. THERE IS NO LIKELIHOOD OF CONFUSION BETWEEN APPLICANT'S MARK AND OPPOSER'S MARKS.

A. The Board Must Consider The *Du Pont* Factors In Determining Whether Marks Are Likely To Be Confused.

"The issue of likelihood of confusion is the ultimate conclusion of law to be decided by the court..." *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1569 (Fed. Cir. 1983); *see also Sweats Fashions Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 4 U.S.P.Q.2d 1793 (Fed. Cir. 1987). "Further, in determining the issue of likelihood of confusion, and hence whether there is any genuine issue of material fact relating to that ultimate legal question, [the TTAB] must consider those of the thirteen evidentiary factors listed in *In re E.I. Du Pont de Nemours & Co.*, 476 F.2d 1357 (CCPA 1973), which are of record and pertinent to the case in question." The thirteen *Du Pont* factors are as follows:

(1) similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression;

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(2) similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use;

(3) similarity or dissimilarity of established, likely-to-continue trade channels;

(4) the conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing;

(5) fame of the prior mark;

(6) number and nature of similar marks in use on similar goods;

(7) nature and extent of any actual confusion;

(8) length of time during and conditions under which there has been concurrent use without evidence of actual confusion;

(9) the variety of goods on which a mark is or is not used;

(10) the market interface between applicant and the owner of a prior mark;

(11) the extent to which applicant has a right to exclude others from use of its mark on its goods;

(12) the extent of potential confusion, i.e., whether *de minimis* or substantial; and

(13) any other established fact probative of the effect of use.

Du Pont, *supra*, at 1361. *Du Pont* also recognized, however, that when determining likelihood of confusion, "each case must be decided on its own facts . . ." and that "each [of these thirteen elements] may from case to case play a dominant role." *Id.* In the instant case, the first *Du Pont* factor – similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression – is dispositive of the issue of likelihood of confusion.

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B. The Dissimilarity Of Marks In Their Entireties Can Establish That No Likelihood Of Confusion Exists.

In *Kellogg, supra*, the Court of Appeals for the Federal Circuit ("CAFC") affirmed a TTAB decision granting summary judgment on the sole basis of the first *Du Pont* factor, namely that there was no likelihood of confusion due to the dissimilarities of the marks in appearance, sound, connotation and commercial impression. 951 F.2d at 332. The CAFC agreed with the TTAB's finding that application of solely the first factor was dispositive and supported dismissal of the opposition:

> The Board held that '[c]onsidering the marks in their entireties, ... they differ so substantially in appearance, sound, connotation and commercial impression that there is no likelihood that their contemporaneous use by different parties will result in confusion.' The Board stated that it would so conclude
>
> > even if opposer offered evidence at trial establishing that it has made prior and continuous use of its mark on goods such as fruit-flavored frozen confections, which are closely related to the goods identified in applicant's application; that the goods move through the same channels of trade to the same classes of purchasers; that the goods are purchased casually rather than with care; and that opposer's mark "FROOT LOOPS" has become a very strong and well known, indeed famous, mark as applied to its goods in commerce. That is, opposer, in responding to the motion for summary judgment on the opposition has not set out any evidence that it could produce at trial which could reasonably be expected to cause us to come to a different conclusion. The first Du Pont factor simply outweighs all of the others which might be pertinent to this case. Accordingly, we believe that there is no genuine issue as to any fact that would be material to our decision on the question of likelihood of confusion, and that applicant is entitled to judgment on this question as a matter of law.

951 F.2d at 332. In affirming the TTAB's decision, the CAFC held that the TTAB correctly ruled that a single *Du Pont* factor - the dissimilarity of the marks - could be and was dispositive of the likelihood of confusion issue, even when viewing all other relevant *Du Pont* factors in Opposer's favor:

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> We know of no reason why, in a particular case, a single *duPont* factor may not be dispositive. *DuPont* recognized that in determining likelihood of confusion "each case must be decided on its own facts." *DuPont, 476 F.2d at 1361, 177 USPQ at 567*. It also recognized that "each [of the thirteen elements] may from case to case play a dominant role." *Id.* The court noted examples of cases in which a particular element made confusion likely or unlikely. *Id. at 1362, 177 USPQ at 567*.
>
> In the present case, the Board ruled that the dissimilarity of "the marks in their entireties" itself made it unlikely that confusion would result from the simultaneous use of the marks. We cannot say that the Board committed any legal error in so holding.

951 F.2d at 333. Since *Kellogg*, the TTAB has maintained that dissimilarity in the entirety of the marks at issue is dispositive of no likelihood of confusion. *Anheuser-Busch*, 2000 TTAB LEXIS 311 at *6 (citing *Kellogg* in support of a finding that "that the single *du Pont* factor of the similarity or dissimilarity of the marks in their entireties totally outweighs any other relevant factors and is dispositive of the issue of likelihood of confusion."); *see also, Inspiration Software, Inc. v. Teacher Inspired Practical Stuff, Inc.*, 2007 TTAB LEXIS 154 (TTAB March 7, 2007) (finding dissimilarity dispositive between Applicant's TEACHER INSPIRED PRACTICAL STUFF and Opposer's INSPIRATION mark); *Henkel Consumer Adhesives, Inc. v. Venilia Societe Anonyme*, 2002 TTAB LEXIS 746 (TTAB December 13, 2002) (finding dissimilarity dispositive between Applicant's EASY-FIX and Opposer's EASY-LINER mark); *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459 (Fed. Cir. 1998) (upholding TTAB decision finding dissimilarity dispositive between Applicant's CRYSTAL CREEK and Opposer's CRISTAL mark); *Travelhost, Inc. v. Welcome Host of America, Inc.*, 1996 TTAB LEXIS 285 (TTAB April 30, 1996) (finding dissimilarity dispositive between Applicant's WELCOME HOST and Opposer's TRAVELHOST mark). An identical conclusion is appropriate in the instant case.

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IV. THE DISSIMILARITY OF APPLICANT'S MARK AND OPPOSER'S MARKS IN THEIR ENTIRETIES IS DISPOSITIVE OF THE ISSUE OF LIKELIHOOD OF CONFUSION AND ENTITLES APPLICANT TO SUMMARY JUDGMENT.

An examination of the parties' marks in their entireties reveal that the marks are so dissimilar in their entireties as to appearance, sound, connotation, and commercial impression that a finding of no likelihood of confusion is proper.

A. The Parties' Marks.

Applicant's mark is **MANGO'S TROPICAL CAFE and Design**, filed on the basis of an intent to use the mark to identify "DVDs featuring music and live entertainment" in International Class 9. Applicant's mark consists of three words and a design element:

In connection with this application, Applicant expressly claims the colors red, pink, brown, blue, gray, purple, green, orange, and yellow as features of the mark. Applicant is also the owner of four U.S. Trademark Registrations for the same mark (other than the color claims), used to identify a variety of goods and services, as follows:

MARK	REGISTRATION NO.	GOODS AND SERVICES
	3,284,057	Restaurant and bar services, in International Class 42
	3,512,984	Prepackaged foods, namely, entrees consisting primarily of poultry, in International Class 29; Computer services, namely, providing a website featuring entertainment information via a global computer network, namely, concert information, nightlife information, and entertainment information about music, singing, dancing, music videos, in International Class 41.

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	3,700,648	Clothing, namely, infant's and children's underwear and bodysuits, t-shirts, sweatshirts, pants, sweatpants, shorts, tank-tops, halter tops, hats, jackets, shirts and sleepwear, International Class 25
	3,649,192	Metal key chains, in International Class 6; Postcards, greeting cards, calendars and pens, in International Class 16; Towels, in International Class 24; Bottled drinking water, in International Class 32; smoker's articles, namely, cigars, cigar cutters, cigarette lighters not of precious metal, and cigar boxes of non-precious metal, in International Class 34.

Applicant also owns U.S. Trademark Application Serial No. 76/157,782 for its **MANGO'S TROPICAL CAFE and Design** mark, filed on the basis of an intent to use the mark to identify "CD-ROMs featuring music and live entertainment" in International Class 9[2]. Copies of records from the U.S. Patent & Trademark Office ("PTO") reflecting the status of Applicant's various trademark registrations and applications are attached hereto as "Exhibit A."

Opposer, on the other hand, is asserting the following marks in this proceeding:

MARK	REGISTRATION NO.	GOODS AND SERVICES
	1,749,894	Musical sound recordings, in International Class 9[3]
MANGO	1,200,278	Prerecorded audio tapes, in International Class 9[4]

[2] This application has been published and a Notice of Allowance was issued on November 17, 2009. Applicant has obtained 3 extensions of time to file its Statement of Use, to date.

[3] Opposer's registration originally included "musical video recordings" but Opposer deleted those goods from the registration.

[4] The asserted registration originally included "phonograph records" but the owner of this registration deleted those goods from the registration. Additionally, PTO records for this registration identify "UMG Recordings Inc." as the owner of this registration, not Opposer, and the Notice of Opposition does not identify any relationship between Opposer and the owner of this registration. In filing this summary judgment motion on the issue of likelihood of confusion, Applicant is not waiving its right to assert any defenses based on Opposer's apparent lack of standing to assert this registration in this proceeding.

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B. The Parties' Marks Are Dissimilar In Their Entireties As To Appearance, Sound, Connotation and Commercial Impression.

1. Appearance of the Marks.

The similarity of appearance between marks is determined through use of the subjective "eyeball" test. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION (4th ed. 2011) §23.15[6] (hereinafter referred to as "MCCARTHY, §___"); *see also Ocean Spray Cranberries, Inc. v. Ocean Garden Products, Inc.*, 223 U.S.P.Q. 1027 (TTAB 1984); *Daimler-Benz Aktiengesellschaft v. Chrysler Corp.*, 169 U.S.P.Q. 686 (TTAB 1971). "The ultimate conclusion of similarity or dissimilarity of the marks must rest on consideration of the marks in their entirety." *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1358 (Fed. Cir. 2000). Therefore, "it is improper to dissect a mark into its component parts for purposes of assessing similarity." *Shen Mfg. Co., Inc. v. Ritz Hotel, Ltd.*, 393 F.3d 1238 (Fed. Cir. 2004), *cert. denied*, 126 S. Ct. 357 (2005). Additionally, "[f]or picture and design marks (as opposed to word marks), similarity of appearance is controlling." MCCARTHY, §23:25.

A visual comparison of Applicant's **MANGO'S TROPICAL CAFE and Design** and Opposer's **MANGO** and **MANGO and Design** indicates that the marks are wholly and completely different in their entireties as to appearance.

Applicant's mark includes the words "MANGO'S", "TROPICAL", and "CAFE", along with a design element:

In its application, Applicant describes the colorful presentation of its mark as follows:

> The color(s) red, pink, brown, blue, gray, purple, green, orange and yellow is/are claimed as a feature of the mark. The mark consists of red [that] can be found on the letters "Mango's Tropical Cafe", as well as on the circle around the parrot and on the two sets of parallel lines emanating from each side of the circle. Red can also be found on the parrot, including patches above the eye, on the area just below and to the right of the beak, in the area just below the broad band across the

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middle of the parrot, and streaks in the tail feathers. Pink can be found on patches to the right of the eye and near the right edge of the parrot, extending downward, towards the broad band across the middle of the parrot, and towards the two coconuts depicted. There are streaks of pink in the tail feathers and speckles of pink can also be found just to the right and below the beak. Brown may be found in the coconuts and as a faint trace at the apex of the curve of the parrot on the right side. Blue can be found in a patch about the eye, comprises the majority of the color of the broad band across the middle of the parrot and comprises the top third of the tail feathers. Blue may also be found speckled above and to the right of the beak. The two parallel bars located above and below the words "tropical cafe" are gray. Purple streaks can be found on the parrot at the end of the tail, near the right and left sides of the parrot, as part of the border between the blue band across the middle and the red sections above and below the blue band, and as small streaks on the head of the parrot. Green is the primary color of the leaves of the palm tree and some green can be found as speckled patches, forming a border between the blue band across the middle of the parrot and the red area above the blue band. Orange streaks can be found in the coconuts. Yellow comprises the border and the veins of the palm leaves. Faint traces of yellow can also be found below the parrot's eye.

In addition, Applicant's Mark includes a cursive presentation of the word "Mango's", with the letter M capitalized, and the words "TROPICAL CAFE" presented in all capital letters.

Opposer asserts two marks in this proceeding. The first is a word mark consisting of a non-stylized presentation of a single word, **MANGO**. The second is a design mark, consisting of the lower-case word "mango" written diagonally across the image of a man's forehead and sandwiched between 4 strands of hair and a man's facial features:

The parties' design marks completely differ in shape, color, stylization and overall appearance:

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The only element shared between the parties' marks is the word "mango," and even that shared element includes an important distinction. Opposer uses the word "mango" while Applicant's use of "mango" is in the possessive, namely "Mango's".

Comparing the appearance of the parties' marks in their entireties, the differences far outweigh the similarities. The graphic elements in each of the parties' design elements are very different and very distinctive in styling. Common usage of the word "mango" (and even that overlap is distinguishable) in design elements featuring a colorful depiction of a parrot perched on a palm tree, on the one hand, and a man, on the other, is not enough to render the appearance of these marks similar in their entireties.

2. Sound of the Marks.

As with similarity in appearance of the marks, when assessing sound "the determination of similarity is made on the basis of the marks in their entireties". *Jet, Inc. v. Sewage Aeration Sys.*, 165 F.3d 419, 423 (6th Cir. 1999) (in finding the marks JET and AER-OB-A-JET visually and verbally distinct, the court "endorsed the 'anti-dissection rule,' which serves to remind courts not to focus only on the prominent features of the mark, or only on those features that are prominent for purposes of the litigation, but on the mark in its totality.").

It nearly goes without saying that the marks at issue in this matter sound completely different phonetically. Applicant's Mark contains three words and seven syllables whereas Opposer's Marks contain one word and two syllables. Moreover, the additional words of

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Applicant's Mark, TROPICAL CAFE, have no sounds in common with Opposer's Marks. Accordingly, the parties' marks, in their entireties, are dissimilar as to sound.

3. Connotations and Commercial Impressions of the Marks.

The different connotations and commercial impressions associated with the parties' marks also indicate a lack of likelihood of public confusion. *General Mills, Inc. v. Frito-Lay, Inc.*, 176 U.S.P.Q. 148 (TTAB 1972); *see also Travelhost, supra* at 294.

The connotation of marks may be determined using dictionary definitions. *Colgate-Palmolive Co. v. Carter-Wallace, Inc.*, 432 F.2d 1400 (CCPA 1970). The differentiating portions of Applicant's Mark include the words "TROPICAL" and "CAFE." TROPICAL is defined as "of, occuring in, characteristic of, or suitable for the tropics or very hot; sultry; torrid."[5] CAFE is defined as "a small restaurant, especially one serving alcoholic drinks and sometimes providing entertainment."[6] When viewed in its entirety, the connotation and commercial impression of Applicant's Mark is that of a restaurant in a geographically tropical region featuring alcoholic beverages and live entertainment. Particularly, Applicant's Mark evokes an image in the mind of relevant consumers of a dining and entertainment establishment in a particular geographic location. The word "MANGO," a *tropical* fruit,[7] as used in Applicant's Mark further suggests a commercial impression of tropical color, richness and flavor. This geographical imagery is expressed by the diverse colors and inclusion of a coconut palm tree and a tropical bird, all prominently featured in Applicant's Mark.

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5 WEBSTER NEW WORLD COLLEGE DICTIONARY (3rd Ed. 1988), p. 1433.

6 *Id.*, at p. 196.

7 *Id.*, at p. 822.

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The proposed use of Applicant's Mark to identify "DVDs featuring music and live entertainment" would readily suggest that the goods are of the type which a consumer would associate with the music, dance and live entertainment commonly found in Applicant's establishment or other hot, sultry and torrid climates. Opposer's **MANGO** mark does not have similar suggestiveness. Opposer's **MANGO and Design** mark contains no coloring and no design elements that refer to or indicate to consumers a connection to a particular tropical climate or tropical geographic region. Nor do Opposer's Marks have any elements that reflect characteristics commonly associated with a dining and entertainment establishment, let alone the presence of such an establishment in a tropical geographic region.

Accordingly, significant differences exist in the connotations and commercial impressions of the parties' marks. "Such differences of connotation and meaning are key factors in determining the likelihood of confusion. Differing connotations themselves can be determinative, even where identical words with identical meanings are used." *Revlon, Inc. v. Jerell, Inc.*, 713 F. Supp. 93 (S.D.N.Y. 1989); *see, e.g., Hard Rock Café Licensing Corp. v. Elsea*, 48 U.S.P.Q.2d 1400, 1409 (TTAB 1998) (COUNTRY ROCK CAFE for a restaurant held not to have a confusingly similar meaning to HARD ROCK CAFE for a restaurant; "country rock and hard rock evoke quite different images for consumers in view of the distinctions between these styles of music"); *Nina Ricci, S.A.R.L. v. Gemcraft, Ltd.*, 612 F. Supp. 1520 (S.D.N.Y. 1985) (L'AIR DU TEMPS held not to have a confusingly similar meaning to L'AIR D'OR; L'AIR DU TEMPS is a French idiom of vague meaning ("timelessness," "in the air," or "of the moment") conveying an "airy, elusive, mellifluous image" while L'AIR D'OR for

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perfume with flakes of gold conveys a "solid, regal image," resulting in different overall impressions).

Since Applicant's Mark conveys an image in the mind of relevant consumers of a dining and entertainment establishment in a particular tropical geographic location, an image which is simply not evoked by Opposer's Marks, it is beyond dispute that the connotations and commercial impressions of Applicant's Mark and Opposer's Marks are entirely dissimilar.

C. As A Matter Of Law, There Is No Likelihood of Confusion.

Since Applicant's Mark and Opposer's Marks differ so substantially in appearance, sound, connotation and commercial impression, the TTAB should find no likelihood of confusion as a matter of law and **GRANT** Applicant's Motion for Summary Judgment.

V. THE LACK OF ACTUAL CONFUSION CONFIRMS THE MARKS ARE NOT LIKELY TO BE CONFUSED.

As detailed above, the dissimilarity of the parties' marks in their entireties commands a finding of no likelihood of confusion in the instant case. Nonetheless, other *Du Pont* factors, namely the absence of any actual confusion, as well as the length of time during, and conditions under, which there has been concurrent use without evidence of actual confusion also supports a finding of no likelihood of confusion. "There can be no more positive or substantial proof of the likelihood of confusion than proof of actual confusion." *World Carpets, Inc. v. Dick Littrel's New World Carpets*, 438 F.2d 482 (5th Cir. 1971).

> [A]n absence of actual confusion, or a negligible amount of it, between two products after a long period of coexistence on the market is highly probative in showing that little likelihood of confusion exists. . . . In this case, Weed Eaters and Leaf Eaters have coexisted on the market for six years with little actual confusion, twice the amount of time that we previously have found convincing.

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Aktiebolaget Electrolux v. Armatron Int'l Inc., 999 F.2d 1, 4 (1st Cir. 1993) (citations omitted).

In the instant case, notwithstanding that the application which is the subject of this proceeding is an intent-to-use application, Applicant has used, advertised, and promoted its mark **MANGO'S TROPICAL CAFE and Design** in interstate commerce in connection with a variety of goods and services since as early as March 1991, a period of over 20 years. *Declaration of David Wallack*, ¶ 2 (hereinafter referred to as "Wallack Declaration"), submitted herewith. Further, Applicant uses, promotes, and advertises Applicant's Mark extensively, and the mark appears on virtually all of Applicant's advertising and promotional materials in connection with Applicant's services and on the various goods identified by Applicant's Mark. [Wallack Declaration, ¶ 3].

PTO records reflect that Opposer has used its marks for over 20 years. Based on these records, Opposer's Marks and Applicant's Mark have coexisted for a period of over two decades without actual confusion. Accordingly, the TTAB must find that the fact that Applicant's Mark and Opposer's Marks have coexisted without confusion for a period of over 20 years dictates that the marks are not likely to be confused.

VI. CONCLUSION

Applicant respectfully submits that Applicant's Mark and Opposer's Marks, when compared in their entireties, differ so significantly in appearance, sound, connotation, and commercial impression that there exists no likelihood of confusion among the parties' marks. Applicant further submits that there is no genuine question of material fact as to the issue of the nonexistence of likelihood of confusion. Accordingly, Applicant respectfully submits that its Motion for Summary Judgment should be **GRANTED**.

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Dated: November 4, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on, a true and correct copy of the foregoing *Applicant's Motion for Summary Judgment and Memorandum of Law in Support Thereof* was served upon Opposer via United States Mail by depositing same in a postage-paid envelope addressed to:

Brent S, Labarge, Esq.
Universal Music Group
2220 Colorado Avenue
Santa Monica, CA 90404

on November 4, 2011.

/s/David K. Friedland
David K. Friedland

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EXHIBIT A

Int. Cl.: 42

Prior U.S. Cls.: 100 and 101

Reg. No. 3,284,057

Registered Aug. 28, 2007

United States Patent and Trademark Office

SERVICE MARK
PRINCIPAL REGISTER

MANGOS TROPICAL CAFE, INC. (FLORIDA CORPORATION)
900 OCEAN DRIVE
MIAMI BEACH, FL 33139

FOR: RESTAURANT AND BAR SERVICES, IN CLASS 42 (U.S. CLS. 100 AND 101).

FIRST USE 3-0-1991; IN COMMERCE 3-0-1991.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "TROPICAL CAFE", APART FROM THE MARK AS SHOWN.

SER. NO. 75-981,783, FILED 11-1-2000.

MARY BOAGNI, EXAMINING ATTORNEY

Int. Cls.: 29 and 41

Prior U.S. Cls.: 46, 100, 101, and 107

United States Patent and Trademark Office

Reg. No. 3,512,984

Registered Oct. 7, 2008

TRADEMARK
SERVICE MARK
PRINCIPAL REGISTER

MANGOS TROPICAL CAFE, INC. (FLORIDA CORPORATION)
900 OCEAN DRIVE
MIAMI BEACH, FL 33139

FOR: PREPACKAGED FOODS, NAMELY, ENTREES CONSISTING PRIMARILY OF POULTRY, IN CLASS 29 (U.S. CL. 46).

FIRST USE 4-2-2007; IN COMMERCE 4-2-2007.

FOR: COMPUTER SERVICES, NAMELY, PROVIDING A WEBSITE FEATURING ENTERTAINMENT INFORMATION VIA A GLOBAL COMPUTER NETWORK, NAMELY, CONCERT INFORMATION, NIGHTLIFE INFORMATION, AND ENTERTAINMENT INFORMATION ABOUT MUSIC, SINGING, DANCING, MUSIC VIDEOS, IN CLASS 41 (U.S. CLS. 100, 101 AND 107).

FIRST USE 3-1-1994; IN COMMERCE 3-15-1995.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "TROPICAL CAFE", APART FROM THE MARK AS SHOWN.

SN 76-978,791, FILED 10-25-2000.

MARY BOAGNI, EXAMINING ATTORNEY

United States of America

United States Patent and Trademark Office

Reg. No. 3,700,648
Registered Oct. 27, 2009

Int. Cl.: 25

TRADEMARK
PRINCIPAL REGISTER

MANGOS TROPICAL CAFE, INC. (FLORIDA CORPORATION)
900 OCEAN DRIVE
MIAMI BEACH, FL 33139

FOR: CLOTHING, NAMELY, INFANT'S AND CHILDREN'S UNDERWEAR AND BODYSUITS, T-SHIRTS, SWEATSHIRTS, PANTS, SWEATPANTS, SHORTS, TANK-TOPS, HALTER TOPS, HATS, JACKETS, SHIRTS AND SLEEPWEAR , IN CLASS 25 (U.S. CLS. 22 AND 39).

FIRST USE 1-0-1997; IN COMMERCE 1-0-1997.

SER. NO. 76-975,197, FILED 11-1-2000.

MARY BOAGNI, EXAMINING ATTORNEY

David J. Kappos

Director of the United States Patent and Trademark Office

Int. Cls.: 6, 16, 24, 32 and 34

Prior U.S. Cls.: 2, 5, 8, 9, 12, 13, 14, 17, 22, 23, 25, 29, 37, 38, 42, 45, 46, 48 and 50

Reg. No. 3,649,192

United States Patent and Trademark Office

Registered July 7, 2009

TRADEMARK
PRINCIPAL REGISTER

MANGOS TROPICAL CAFE, INC. (FLORIDA CORPORATION)
900 OCEAN DRIVE
MIAMI BEACH, FL 33109

FOR: METAL KEY CHAINS, IN CLASS 6 (U.S. CLS. 2, 12, 13, 14, 23, 25 AND 50).

FIRST USE 1-0-1997; IN COMMERCE 1-0-1997.

FOR: POSTCARDS, GREETING CARDS, CALENDARS AND PENS, IN CLASS 16 (U.S. CLS. 2, 5, 22, 23, 29, 37, 38 AND 50).

FIRST USE 1-0-1997; IN COMMERCE 1-0-1997.

FOR: TOWELS, IN CLASS 24 (U.S. CLS. 42 AND 50).

FIRST USE 1-0-1997; IN COMMERCE 1-0-1997.

FOR: BOTTLED DRINKING WATER, IN CLASS 32 (U.S. CLS. 45, 46 AND 48).

FIRST USE 8-0-1997; IN COMMERCE 8-0-1997.

FOR: SMOKER'S ARTICLES, NAMELY, CIGARS, CIGAR CUTTERS, CIGARETTE LIGHTERS NOT OF PRECIOUS METAL, AND CIGAR BOXES OF NON-PRECIOUS METAL, IN CLASS 34 (U.S. CLS. 2, 8, 9 AND 17).

FIRST USE 1-0-1997; IN COMMERCE 1-0-1997.

THE MARK CONSISTS OF A PARROT, FOUR COCONUT PALM FRONDS, AND TWO COCONUTS CENTERED IN A CIRCLE WHICH HAS TWO SHORT PARALLEL LINES EXTENDING OUTWARD FROM BOTH THE TOP LEFT AND LOWER RIGHT QUADRANTS OF THE CIRCLE. THE WORD "MANGO'S" IS CENTERED ABOVE THE CIRCLE, AND THE WORDS "TROPICAL CAFE" ARE CENTERED BELOW THE CIRCLE. THE WORDS "TROPICAL CAFE" ARE SET OFF BY TWO PARALLEL LINES, ONE ABOVE AND ONE BELOW THESE WORDS.

SER. NO. 76-978,957, FILED 11-1-2000.

MARY BOAGNI, EXAMINING ATTORNEY

U.S. Patent and Trademark Office (USPTO)

NOTICE OF ALLOWANCE

NOTE: If any data on this notice is incorrect, please fax a request for correction to the Intent to Use Unit at 571-273-9550. Please include the serial number of your application on ALL correspondence with the USPTO.

ISSUE DATE: Nov 17, 2009

LESLIE J. LOTT
LOTT & FRIEDLAND
P.O. DRAWER 141098
CORAL GABLES, FL 33114-1098

** IMPORTANT INFORMATION: 6 MONTH DEADLINE **

You filed the trademark application identified below based upon a bona fide intention to use the mark in commerce. You must use the mark in commerce and file a Statement of Use (a.k.a. Allegation of Use) before the USPTO will register the mark. You have six (6) MONTHS from the ISSUE DATE of this Notice of Allowance (NOA) to file either a Statement of Use, or if you are not yet using the mark in commerce, a Request for Extension of Time to File a Statement of Use ("Extension Request"). If you file an extension request, you must continue to file a new request every six months calculated from the issue date of the NOA until the Statement of Use is filed. Applicant may file a total of five (5) extension requests. FAILURE TO FILE A REQUIRED DOCUMENT DURING THE APPROPRIATE TIME PERIOD WILL RESULT IN THE ABANDONMENT OF YOUR APPLICATION.

Please note that both the "Statement of Use " and "Extension Request" have many legal requirements including fees. Therefore, we encourage use of the USPTO forms, available online at http://www.uspto.gov/teas/index.html (under "INTENT-TO-USE (ITU) FORMS"), to avoid the possible omission of important information. Please note that the Trademark Electronic Application System (TEAS) provides line-by-line help instructions for completing the Extension Request or Statement of Use forms online. If you do not have access to the Internet, you may call 1-800-786-9199 to request the printed form(s).

**** Registration Subject to Cancellation for Fraudulent Statements ****

Ensure that statements made in filings to the USPTO are accurate, as inaccuracies may result in the cancellation of your trademark registration. The lack of a bona fide intention to use the mark with all goods and/or services included in an application or the lack of use on all goods and/or services for which you claimed use could jeopardize the validity of your registration, possibly resulting in its cancellation.

The following information should be reviewed for accuracy:

SERIAL NUMBER:	76/157782
MARK:	MANGO'S TROPICAL CAFE (AND DESIGN)
OWNER:	Mangos Tropical Cafe, Inc. 900 Ocean Drive Miami Beach , FLORIDA 33139

This application has the following bases, but not necessarily for all listed goods/services:

Section 1(a): NO Section 1(b): YES Section 44(e): NO

GOODS/SERVICES BY INTERNATIONAL CLASS

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Universal International Music B.V.,
Opposer,

v.

Mango's Tropical Cafe, Inc.,
Applicant.

Opposition No.: 91200153

Application Serial No.: 85/069,828

Date of Publication: December 7, 2010

Mark: MANGO'S TROPICAL CAFE AND DESIGN

DECLARATION OF DAVID WALLACK

1. My name is David Wallack and I am Chief Executive Officer and a founder of Applicant Mango's Tropical Cafe, Inc. (hereinafter "Mango's Tropical Cafe"). I am over the age of twenty-one. I am competent to make this Declaration, and the facts provided herein are based on my personal knowledge and documents maintained by my office in the ordinary course of business.

2. Mango's Tropical Cafe has used, advertised, and promoted its mark **MANGO'S TROPICAL CAFE and Design** in interstate commerce in connection with a variety of goods and services since at least as early as March 1991, a period of over 20 years.

3. Mango's Tropical Cafeuses, promotes, and advertises its **MANGO'S TROPICAL CAFE and Design** mark extensively, and the mark appears on virtually all of Mango's Tropical Cafe's advertising and promotional materials in connection with its services and on the various goods identified by the mark.

4. Over the past 20 years, I have never been asked whether Mango's Tropical Cafe is affiliated with or sponsored by any recording label, including Universal's MANGO label, a

label I had never heard of until this opposition proceeding was filed against my company. To the best of my knowledge, there have been no instances of confusion between my company's **MANGO'S TROPICAL CAFE and Design** mark and Universal International Music's MANGO marks.

I declare under penalty of perjury under the laws of the United States and the State of Florida that the foregoing is true and correct.

DATED THIS 31st DAY OF Oct, 2011.

DAVID WALLACK